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Til underretning for Folketingets Europaudvalg vedlægges et konceptpapir fra EU om forholdet mellem WTO's regelsæt og multilaterale miljøaftaler (MEA'er).

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Committee on Trade and Environment
Special Session

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**THE RELATIONSHIP BETWEEN WTO RULES AND MEAS IN THE CONTEXT
OF THE GLOBAL GOVERNANCE SYSTEM**

Submission by the European Communities

Paragraph 31

The following submission, dated 22 March 2004, is being circulated at the request of the delegation of the European Communities.

INTRODUCTION

In the context of the negotiations on paragraph 31 (i) the EU submitted a paper to the CTE in March 2002 (TN/TE/W/1). The submission addressed two main strands of the 31 (i) debate: a discussion of principles underlying the global governance system, in particular the relationship between MEAs and WTO agreements, and a discussion of the definition on the concepts set out in paragraph 31 (i). So far the debate on 31 (i) in the CTE has focused on the latter, in particular on the Specific Trade Obligations debate, where some useful progress has been made. The EU has actively contributed to this debate, *inter alia* with more in-depth submissions on the definition of Specific Trade Obligations (STOs), and intends to continue to participate in it constructively.

In the following submission the EU would therefore like to refocus on the governance section of our 2002 submission, since, as the EU has stated before, the MEA/WTO relationship is an international governance issue which, in particular, is related to the necessary links between international organizations and treaties dealing with international trade and environment. We believe that it would be useful to consider the MEA/WTO debate in the context of the global governance system for sustainable development. Finally, we are also picking up on points addressed by Switzerland in their 2002 submission on this mandate (TN/TE/4).

From the outset, it is worth recalling that all members of the international community, collectively and individually, are committed and responsible for the protection of the environment and for achieving a sustainable development, nationally as well as at the global level, as stated in Rio Principle 7: "*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem ...*". Furthermore, the close link between environment and development is emphasized in Rio Principle 4 which states that "*In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*". MEAs consequently have a key role to play to address global and transboundary environmental challenges in order to promote global sustainable development.

It is also widely recognized that the interface between trade and environment and, in particular, MEAs and WTO agreements, is steadily growing and that ensuring a mutual supportiveness between the two sets of rules is essential. This has been recognized on numerous occasions by the international community. Even though trade or trade-related measures are not systematically used in MEAs, they can be needed in certain cases to achieve the environmental objective and it should be noted that their use is increasing.

Various international fora have emphasized this position: UNEP's synthesis report of January 2002, for example, stated that "At international level, enhancing synergies between the governance structures established for the environment, trade and finance will be a key to shaping a sustainable global economy".¹ The same views were confirmed and restated *inter alia* in the Plan of Implementation of the WSSD.²

This paper builds on, but is not limited to, paragraph 19 of our 2002 submission, which referred to a number of basic governance principles that are in our view essential in the relationship between MEAs and WTO agreements and should be reflected in the negotiations under 31 (i):

Paragraph 19 "... the EU considers that the relationship between WTO rules and MEAs in the context of a global governance system should be based on the following principles:

- *"The importance and necessity of MEAs: global environmental problems need a multilateral approach and solutions; accordingly unilateral action should be avoided as far as possible.*
- *Multilateral environmental policy should be made within multilateral environmental fora, and not in the WTO, in accordance with each body's respective expertise and mandate.*
- *When governments around the world develop positions for MEAs negotiations it is desirable that they give consideration to relevant WTO rules so as to ensure a mutually supportive relationship between both sets of rules. When the trade and environment interface raises novel trade-related questions, these could usefully be a subject of information exchange between the MEA secretariat and the relevant WTO Committees.*
- *MEAs and WTO are equal bodies of international law. They should recognize each other with a view to being mutually supportive, in order to meet the common goal of sustainable development.*
- *WTO rules should not be interpreted in "clinical isolation" from other bodies of international law and without considering other complementary bodies of international law, including MEAs".³*

These governance principles, as will be addressed below, have been confirmed in various international fora, a few of which will be recalled in the text. They form the "aquis" in the field of trade, environment and international governance.

¹ "Enhancing Synergies and Mutual Supportiveness of Multilateral Environmental Agreements and the World Trade Organization: A Synthesis Report", January 2002, UNEP

² Plan of Implementation of the World Summit of Sustainable Development, Johannesburg, September 2002

³ Appellate Body in *Reformulated Gasoline* case

THE IMPORTANCE AND NECESSITY OF MEAS

The first two bullet points of paragraph 19, above, refer to the importance of a multilateral approach and solutions to global environmental problems.

The importance of multilateral cooperation, regional and global, to tackle global environmental problems is widely recognized. Indeed, unilateral action taken by one country is unlikely to be effective in solving the transboundary or global environmental problems that the world is increasingly facing today.

The principle of multilateral cooperation and solutions in solving issues of global sustainable development has been endorsed in various global summits and ministerial-driven processes. Among the examples are: principle 24 of the Stockholm Conference of 1972, the Brundtland Commission of 1987, Agenda 21, The Rio Declaration (UNCED) and the WSSD.

In its report to the Singapore Ministerial (para. 171) the CTE stated that: *"The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both"*.

In the EU's view, MEAs have many advantages over unilateral solutions to tackle global or transboundary environmental challenges, the most important of which are that:

From an environmental point of view, collective action and co-operation for tackling a global threat and achieving a common objective is without doubt the most effective course of action.

The way MEAs are negotiated and agreed (i.e. by consensus in a multilateral context) works as an effective guarantee against discriminatory action and their use for protectionist purposes.

MEAs represent a concrete implementation of the "common but differentiated responsibility" principle (Principle 7 of the Rio Declaration) and do offer broad policy packages. While trade measures that may be needed in certain cases to achieve the environmental objective of co-operation provisions, other measures (in particular financial, technology transfer, technical assistance and capacity building), are at least an equally important part of the MEA package. Such measures can clearly be crucial, notably for developing countries, in the effective implementation of an MEA. In this connection, paragraph 173 of the Singapore report rightly notes that: *"Adequate international cooperation provisions, including among them financial and technological transfers and capacity building, as part of a policy package in MEAs are important and can be indispensable elements to facilitate the ability of governments, particularly of developing countries, to become Parties to an MEA ..."*

The EU therefore considers that it is worth recalling the responsibility of all countries to co-operate in view of tackling global environmental threats and the associated positive status of multilateral policy measures, as opposed to unilateral ones, both in the trade and the environment areas.

MULTILATERAL ENVIRONMENTAL POLICY SHOULD BE MADE WITHIN MEAS

Recognizing the importance and necessity of MEAs also implies the recognition of their competence in dealing with global environmental issues, in accordance with their respective mandates and objectives.

From this follows that MEAs should be responsible for developing and deciding upon the necessary measures and action needed to achieve the environmental objective, including trade measures if considered necessary and appropriate. It naturally follows that environmental policy should not be made in the WTO. However, given the strong interlinkages between the policy areas of environment and trade, close policy coordination between the two bodies is however essential (see section 3 below).

One practical application of this principle is the recommendation of the CTE that, in case of disputes over trade measures applied pursuant to an MEA, parties to the MEA in question should consider settling their differences in that forum (CTE report to Singapore, para.178). This "good governance" principle is not only important for the development of environmental policy at the global level, but also critical for WTO's own credibility and legitimacy.

THE NEED FOR CLOSE COOPERATION AND INCREASED INFORMATION FLOWS AT NATIONAL AND INTERNATIONAL LEVELS BETWEEN THE INTERNATIONAL BODIES IN ORDER TO ENHANCE THE MUTUAL SUPPORTIVENESS BETWEEN INTERNATIONAL TRADE AND ENVIRONMENT POLICIES

The third bullet point of paragraph 19 refers to the need for close policy coordination and proper information flows when developing MEAs. There are broad benefits to be gained from such cooperation, not only in ensuring mutual legal consistency but also in allowing for increased information exchanges, identifying synergies between, and ensuring mutual supportiveness of, international trade and environment policies. Both dimensions, namely conflict prevention and synergies, are equally important components of a mutually supportive relationship.

National policy coordination is of primary importance to ensuring coherency in the area of trade and environment. This means that, when negotiating and implementing MEAs, trade considerations and relevant trade rules have to be taken into account by countries at a national level. It is clear that countries have a responsibility to ensure the coherence and mutual support of their positions and commitments in different fora.

Policy coordination can be encouraged and further enhanced through increased co-operation and information flows between the WTO and MEAs secretariats which in turn should inevitably trigger the need for better co-ordination at national level. The WSSD confirmed, in paragraph 91 (c) of the Plan of Implementation, the need to "*encourage efforts to promote cooperation on trade, environment and sustainable development ... between the secretariats of WTO, UNCTAD, UNDP, UNEP and other relevant international environmental and development and regional organizations*".

The CTE Singapore Report had already identified observer status as a means to this end:

"... Observer status for relevant MEAs in WTO bodies, as appropriate, can play a positive role in creating clearer appreciation of the mutually supportive role of trade and environmental policies. Requests from the appropriate bodies of MEAs for observer status should be considered in this light. The CTE should also consider extending invitations to appropriate MEA institutions to attend relevant discussions of the CTE" (para. 175).

These statements recognize that a productive dialogue between relevant international bodies can be crucial to ensuring the effective delivery of environmental commitments, and to further developing international consensus on issues relating to trade and environment.

Since Singapore, information exchange in the WTO on issues within the trade and environment interface has been undertaken by the CTE. As stated in our October 2002 CTE proposal on MEA information exchange and observer status (TN/TE/W/15), while noting that these discussions have not a priori allowed for concrete and measurable results, these sessions have proved, nonetheless, useful

and constructive in allowing for a valuable two-way flow of information. As also stated in the October 2002 paper, the EU considers that strengthening these existing processes - for example by agreeing on structure and follow-up to discussions, institutionalizing exchange sessions, and encouraging other WTO committees to convene similar events - would be productive in identifying synergies and ensuring mutual supportiveness between international bodies working on trade and environment.

WSSD reiterated this goal, stating in paragraph 121 that "*measures should be taken to strengthen sustainable development institutional arrangements at all levels*" in order to achieve objectives such as "*integration of the economic, social and environmental dimensions of sustainable development in a balanced manner*" and "*enhancing participation and effective involvement of civil society and other relevant stakeholders ...*".

The EU believes that the importance of the need for coordination and cooperation at all levels of trade and environment policy-making should be reinforced by the work undertaken by the CTE on DDA. Cooperation and exchange of information can also be of considerable usefulness in the context of WTO dispute settlement proceedings, as was rightly recognized by the CTE in its Singapore Report.⁴

MEAS AND WTO ARE EQUAL BODIES OF INTERNATIONAL LAW AND NEED TO GIVE CONSIDERATION TO EACH OTHERS' RULES TO ACHIEVE MUTUAL SUPPORTIVENESS

The fourth and fifth bullet point of paragraph 19 refer to the legal relationship between the two bodies of international law.

The principle of mutual supportiveness is based on the assumption that both sets of rules, MEAs and the WTO, are equal in terms of status in international law and that there consequently is no hierarchy between them. This was echoed in the Plan of Implementation of the WSSD, paragraph 98: "*Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments*".

The goal of enhancing the mutual supportiveness of trade and environmental treaties must be achieved not only through the establishment of an appropriate framework for interaction between international organizations, but also through the operation of fundamental legal principles relating to the harmonious interpretation and application of treaty rules. States that are both parties to an MEA and to the WTO would normally aim at fulfilling both sets of obligations in a consistent way, following an interpretation of the relevant legal rules that avoids any potential conflict between them. The same approach is followed by adjudicatory bodies.

Much of the above is encapsulated in the Appellate Body's conclusion in the *Gasoline* case as regards the interpretation of WTO rules in the broader context of public international law.⁵ This leads to the important conclusion that policy formulation and legal interpretation in MEAs and the WTO cannot be undertaken in isolation from each other. Even if the two sets of law have developed in

⁴ CTE Singapore Report: "The CTE recognises the benefit of having all relevant expertise available to WTO panels in cases involving trade-related environmental measures, including trade measures taken pursuant to MEAs".

⁵ Referring to the clarification of WTO provisions in accordance with customary rules of public international law, which the Appellate Body has been directed to apply, the Appellate Body said: "That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law", WT/DS2/AB/R, p.20.

different fora, rather than under a common constitutional umbrella, they nevertheless equally reflect the will and needs of the international community.

This state of affairs is fundamentally based on the so-called "deference" principle: both WTO and MEAs should remain responsible and competent for issues falling within their respective primary areas of competence and expertise. While MEAs are responsible for environmental policy making, the WTO is competent for ensuring that the national implementing measures are not protectionist; i. e. constitute a means of arbitrary or unjustifiable discrimination or disguised restrictions on international trade.

Mutual supportiveness, therefore, essentially lies in the recognition of the very existence and competence of each other, and in the development of substantive linkages which recognize this inter-connectedness without indicating hierarchy.

The EU would favour an open discussion in the CTE on how such governance principles operate to enhance the mutual supportiveness between MEAs and the WTO as equal bodies of international law, including consideration of practical steps to facilitate the interaction between the two.

CONCLUSION

The above governance principles constitute a useful backdrop in shaping the relationship between MEAs and WTO agreements. They give a clearer and broader picture of the global governance system as it relates to sustainable development and the spirit in which it operates. Furthermore, they emphasize the need to ensure that the WTO is part of this system and, in particular, that it does not operate in isolation from international developments and agreements in other fields that are more specific but nevertheless trade-related.

The fact that there has so far been no conflict between MEAs and WTO rules is highly encouraging. However, considering that the interface between the two sets of law is growing, we should ensure that such a harmonious co-existence is preserved and that everything is done to enhance their mutual supportiveness.
